In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-694

GENERAL STEEL PRODUCTS COMPANY,
A DIVISION OF THE SENG COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-8) is reported at 503 F.2d 896. The Board's decision and order (Pet. App. 10-32) are reported at 207 NLRB No. 112.

JURISDICTION

The decision of the court of appeals was rendered on October 1, 1974 (Pet. App. 1), and a timely petition for rehearing was denied on November 4, 1974 (Pet. App. 9). The petition for a writ of certiorari was filed on December 4, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in the circumstances of this case, the Board had power to reinstate a previously dismissed valid election petition upon finding, pursuant to a court of appeals remand, that a card-based bargaining order was no longer appropriate since a fair rerun election could then be held.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth at Pet. 3-4.

STATEMENT

On August 14, 1964, the Union[1] filed a representation petition under Section 9(c)(1) of the Act 29 U.S.C. 159(c)(1) (Case No. 11-RC-2022), which led to an election among petitioner Company's employees, which the Union lost. The Union filed objections to the election and unfair labor practice charges. The Board set aside the election because of the Company's violation of Section 8(a)(1) of the Act, and held that, since the Union then had authorization cards from a majority of the employees, the Company, in refusing to bargain, had violated Section 8(a)(5). The Board, *inter alia*, directed the Company to bargain with the Union, and dismissed the representation petition. 157 NLRB 636.

The court of appeals upheld the Board's order setting aside the election, but denied enforcement of the bargaining order. 398 F.2d 339 (C.A. 4). In *National Labor Relations Board* v. *Gissel Packing Co.*, 395 U.S. 575, this Court reversed the latter action, but remanded the case to

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[1]Upholsterers' International Union of North America, AFL-CIO.

the Board because it had not made a finding that (*id.* at 616):

> even though traditional remedies might be able to ensure a fair election, there was insufficient indication that an election (or a rerun in *General Steel*) would definitely be a more reliable test of the employees' desires than the card count taken before the unfair labor practices occurred.

Pursuant to this remand, the Board issued a supplemental decision (180 NLRB 56) again ordering the Company to bargain with the Union. The court of appeals again declined to enforce the Board's bargaining order (445 F.2d 1350), and remanded the case to the Board, directing it (*id.* at 1356):

> * * * not to limit its inquiry to events occurring prior to the first unfair labor practice hearing but [to] receive proof of any material fact occurring up to the date of the new hearing bearing upon a determination whether or not a fair [rerun] election could be held.

On the second remand, the Board found that, in the light of changed conditions, a bargaining order was no longer necessary since a fair election could then be held. It ordered that the petition in Case No. 11-RC-2022 be reinstated, and directed a new election thereon. 199 NLRB 859. In that election, a majority of the employees in the appropriate unit voted for the Union. The Company filed objections to alleged Union misconduct affecting the election, and also asserted for the first time that the Board lacked authority to reinstate the petition. The objections were overruled, and the Union was certified as the employees' representative (Pet. App. 16-18).

Following certification, the Company refused the Union's request to bargain; a complaint issued on the Union's charge alleging that the Company had violated Section 8(a)(5) and (1) of the Act; and the Board, granting the General Counsel's motion for summary judgment, sustained the allegations of the complaint. The Board ordered the Company to bargain with the Union. (Pet. App. 10-32.)

The court of appeals enforced the Board's order, holding that the Board did not exceed its authority in reinstating the election petition[2] (Pet. App. 1-8).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with the decision of any other court of appeals. For these reasons, and since the issue presented is not important in the administration of the Act, further review is not warranted.

1. It is uncontested that the Union's 1964 representation petition was valid and fulfilled the requirements of Section 9(c)(1) of the Act. The Company contends, however, that the Board, having dismissed that petition, lacked authority *sua sponte* to reinstate it. The court below properly rejected this contention. As the court stated (Pet. App. 5-6):

> The Board's * * * entry of a bargaining order based on a card count * * * appeared to make the election petition superfluous and the Board dismissed it. When the bargaining order was ultimately determined to have been erroneously granted, the election petition became an appropriate instrument for determining

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[2]The court of appeals also held that the Board properly disposed of the Company's other election objections without an evidentiary hearing (Pet. App. 8), and the Company does not challenge that holding here.

the question of representation over which the parties had been continuously litigating.

The Board's correction of its error was not limited to vacating the bargaining order which this court had declined to sustain. It could go further and reinstate the election petition which it had improvidently dismissed on the mistaken assumption that its bargaining order was enforceable.

The court's holding that the Board was thus empowered to correct its error is an application of the principle, first enunciated in *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 145, and recently reaffirmed in *National Labor Relations Board* v. *Food Store Employees Union*, 417 U.S. 1, 9, that:

> * * * an administrative determination in which is imbedded a legal question open to judicial review does not impliedly foreclose the administrative agency, after its error has been corrected, from enforcing the legislative policy committed to its charge.

2. Contrary to petitioner's contention (Pet. 11-15), the decision below is not inconsistent with *Peerless of America, Inc.* v. *National Labor Relations Board*, 484 F.2d 1108 (C.A. 7), or *Fort Smith Outerwear, Inc.* v. *National Labor Relations Board*, 499 F.2d 223 (C.A. 8). There, the courts refused to enforce Board bargaining orders, and then remanded to the Board for the expeditious scheduling of a representation election. When Board counsel later advised the courts that they lacked jurisdiction to direct a representation election (*American Federation of Labor* v. *National Labor Relations Board*, 308 U.S. 401), the election requirements were deleted. The court of appeals here, however, did not direct the Board to hold an election, but only to determine whether a fair election could be held. 445 F.2d at 1356. As the court of appeals concluded (Pet. App. 8):

> It is one thing for the Board to assert its own authority to reinstate a representation petition and order an election under §9(c) of the Act, as it has done here. It is quite another proposition for the Board to question a court's exercise of similar authority, as it did in *Peerless* and *Ft. Smith.* The Board's positions are complementary, not inconsistent.[3]

There is no inconsistency between the decision below and *Linden Lumber Division* v. *National Labor Relations Board,* No. 73-1231, decided December 23, 1974 (see *amicus* brief of American Retail Federation, 3-4). The latter case holds that an employer who has not engaged in unfair labor practices which impair the electoral process can lawfully insist that the union establish its majority status in a Board election, and place the burden of filing a petition on the union. Here, the union did file a petition with the Board, which the Board erroneously dismissed. The Board's later correction of that error cannot in any realistic sense be viewed as shifting the burden of filing a petition from the union to the employer.

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[3]The Board faced a situation similar to that here after the Seventh Circuit's remand in *New Alaska Development Corp.* v. *National Labor Relations Board,* 441 F.2d 491. There, the Board, upon applying the principles enunciated in *Gissel, supra,* and finding that a fair election could then be held, reinstated the representation petition previously dismissed (see 175 NLRB 780) and directed a rerun election pursuant to the reinstated petition. *New Alaska Development Corp.,* 194 NLRB 830.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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